IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NOS. 54 AND 58 OF 2001.

CRIMINAL APPEAL NO. 54 OF 2001.

Shri Manuel Gabriel Rodrigues,
r/o Braganza Apartments, 2nd
Floor, Agonda, Mapusa, presently
at Central Jail, Aguada. ... Appellant.

Versus

State through Police Inspector,
Panaji. ... Respondent.

Mr. Jos Peter D'Souza, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the
Respondent/State.

CRIMINAL APPEAL NO. 58 OF 2001.

State through Police Inspector,
Panaji. ... Appellant.

Versus

Edwin D'Souza, r/o H. No. 440,
Firguembhat, Guirim, Mapusa. ... Respondent.

Mr. S.N. Sardessai, Public Prosecutor for the
Appellant/State.

Mr. J.P. Mulgaonkar, Advocate for the Respondent.

Coram : F.I. REBELLO AND
P.V. HARDAS, JJ.

Date : 24th June 2003.

ORAL JUDGMENT :(Per Hardas,J.)

Criminal Appeal No. 54 of 2001 is filed by the original accused no. 4, who, by the Judgment of the learned Additional Sessions Judge, Panaji, dated 27th August 2001, in Sessions Case No. 39 of 1998, stands convicted for offences punishable under Sections 304(II)

and 308 of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for 6 and 3 years respectively. The sentences are directed to run concurrently. It is this conviction and sentence which are assailed in Criminal Appeal No. 54 of 2001.

2. Criminal Appeal No. 58 of 2001 is filed by the State, being aggrieved by the acquittal of the respondent/original accused no. 8, as passed by the Additional Sessions Judge, Panaji, by Judgment, dated 27th August 2001, in Sessions Case No. 39 of 1998. Since both the appeals arise from the same Judgment of the learned Additional Sessions Judge, Panaji, they are being decided by this common Judgment.

3. The brief facts necessary for the decision of the appeals are set out hereunder:-

The prosecution has alleged that on 26th May 1998, the present appellant in Criminal Appeal No. 54 of 2001 and respondent in Criminal Appeal No. 58 of 2001 alongwith eight other persons including the absconding accused hatched a criminal conspiracy to kill Sunil Mochemadkar and accused nos. 1 to 5, 7 and 9 proceeded to Dona Paula in a Maruti Van bearing registration number GA-01-V-3516 and original accused nos. 4 and 8 (the appellant and the respondent in these

appeals) proceeded on a Yamaha motorcycle bearing registration number GDN-3849 and wrongfully restrained the said Sunil Mochemadkar and Rajesh Jambaulikar at the slope of Dona Paula road, at about 9.10 p.m., while the said Sunil and Rajesh were proceeding towards Caranzalem on scooter and the appellant/original accused no. 4 stabbed Sunil and Rajesh, due to which, Rajesh died and Sunil received stab injury.

4. Charge for an offence punishable under Section 120-B of the Indian Penal Code, in the alternative under Sections 149, 143, 148, 341, 302 and 307 of the Indian Penal Code, vide Exhibit 7, was framed against the accused. All the accused denied their guilt and claimed to be tried. The prosecution in support of its case examined in all 33 witnesses. In the present appeals, reference to the evidence of only those witnesses is made, whose evidence is material to test the conviction of the original accused no. 4 and the acquittal of original accused no. 8.

5. The prosecution examined P.W.5 Sunil Machamadkar, P.W.6 Mohammad Badshah and P.W.7 Aspak Ali as eye witnesses to the incident. P.W.5 Sunil in his evidence states that in the year 1994 he was a student studying in the polytechnic. He has identified original accused no. 6 Damaciano Fernandes and original accused

no. 3 Brazinho Fernandes, who is the brother of accused no. 6 Damaciano. He states that accused no. 6 and accused no. 3 are residing at Socorro in the same house and he had visited their house. He further states that he had lent Rs. 1,000/- to accused no. 6 Damaciano at the request of accused no. 6 some time in February 1998. Accused no. 6 had promised to return the same after one month. However accused no. 6 Damaciano did not return the money as promised and had further promised to return the said amount after about two months. On 26th May 1998, at about 4.00 p.m., P.W.5 Sunil had spoken on telephone with accused no. 6 Damaciano and had asked accused no. 6 Damaciano for the return of his money and accused no. 6 Damaciano had told P.W.5 Sunil to come and collect the same from his residence. P.W.5 Sunil further states that he took his father's scooter and went to his friend's house by name Mohamed Hussein Badshah (P.W.6). P.W.6 Mohamed Badshah took his Kinetic scooter saying that he wanted to give it to a mechanic on the way and after delivering the Kinetic scooter of P.W.6 to the mechanic, both P.W.5 Sunil and P.W.6 Mohamed proceeded on the scooter to the house of accused no. 6 Damaciano. On reaching the house of accused no. 6 Damaciano, P.W.6 Mohamed remained near the gate of the house, while P.W.5 Sunil entered the house. P.W.5 Sunil told accused no. 6 Damaciano that he had come to take the money and, to

that, accused no. 6 Damaciano had uttered whether P.W.5 Sunil had become a goonda. However, accused no. 6 Damaciano did not give the money as promised and instead slapped P.W.5 Sunil. P.W.6 Mohamed came and intervened and stopped accused no. 6 Damaciano assaulting P.W.5 Sunil. P.W.5 Sunil also alleges that accused no. 6 Damaciano threatened to kill him.

6. P.W.5 Sunil and P.W.6 Mohamed returned home at about 7.30 p.m.. Before their return, a telephone call from accused no. 6 Damaciano had been received by the mother of P.W.5 Sunil and the mother of P.W.5 Sunil was told that she should take care of her son. This was narrated to P.W.5 Sunil by his mother. At about 8.45 p.m. they went near the ground where there is a stone platform and where they usually sat. P.W.5 Sunil, P.W.6 Mohamed and P.W.7 Aspak alongwith deceased Rajesh and some other friends from the colony were sitting on the said stone platform. At that time they saw a Yamaha motorcycle and a Maruti van moving in the colony. At about 9.00 p.m. deceased Rajesh requested P.W.5 Sunil to reach him on his scooter. While P.W.5 Sunil was taking Rajesh and on reaching near the Dona Paula slope, one Yamaha motorcycle came and the driver of the motorcycle asked P.W.5 Sunil to stop and had asked him whether he was Sunil. P.W.5 Sunil has identified the original accused no. 4/appellant Manuel as the person

who had asked him to stop. In the meantime P.W.7 Aspak also reached there alongwith P.W.6 Mohamed. A Maruti van came there and the persons from the Maruti van got down and surrounded them. Original accused no. 4/appellant Manuel had asked P.W.5 Sunil whether he was a big goonda and whether he wanted money. Accused no. 4 Manuel caught the shirt of P.W.5 Sunil and stabbed him with a knife on his stomach. Seeing the assault on P.W.5 Sunil, deceased Rajesh attacked Manuel. Accused no. 4 Manuel also stabbed deceased Rajesh. Accused no. 8 Edwin (respondent in Criminal Appeal No. 58 of 2001) caught the hands of deceased Rajesh and accused no. 4 Manuel had stabbed Rajesh. After stabbing both P.W.5 Sunil and deceased Rajesh, the persons who had surrounded them went away. P.W.7 Aspak took P.W.5 Sunil to the police station, where P.W.5 Sunil narrated the incident and came back accompanied by police. P.W.6 Mohamed went to the house of Rajesh to inform them about the incident. Deceased Rajesh and P.W.5 Sunil were then taken to the Goa Medical College, where P.W.5 Sunil was operated upon and was discharged after about 15 days. Rajesh, however, had succumbed to his injuries and had died. P.W.5 Sunil has identified the clothes worn by accused no. 4 Manuel. The pant is at Exhibit 2. The T-shirt worn by accused no. 8 Edwin is Exhibit 6.

7. In the cross-examination an omission was

brought out in the evidence of P.W.5 Sunil to the effect that he had not stated in his statement that accused no. 6 Damaciano had asked him whether he had become a goonda. Similarly an omission was brought out wherein P.W.5 Sunil had not stated in his statement that P.W.6 Mohamed has asked P.W.5 Sunil to go home to avoid any trouble. Similarly an omission was brought out regarding keeping the scooter on its stand and also P.W.7 Aspak reaching there alongwith P.W.6 Mohamed and putting his scooter on the stand. An omission has also been brought out regarding accused no. 4 Manuel asking P.W.5 Sunil whether he had become a big goonda and whether he wanted money. Contradiction is brought out in his statement that he had identified accused no. 8 Edwin before the Police Inspector while recording his statement. In the cross-examination the following answer was elicited "I do not admit that I did not know A-4 Manuel prior to the incident. I did not know A-4 Manuel by name. I knew him by face and I had not given his name to the police."

8. P.W.6 Mohamed Badshah stated that P.W.5 Sunil came to his house and told him that they should go to the house of accused no. 6 Damaciano and Sunil left on his scooter and he waited for P.W.6 Mohamed at the Kadamba Transport Corporation bus stand and P.W.6 Mohamed left on his Kinetic scooter, which he wanted to

give to the mechanic for repairs and it was the mechanic who had reached him to the bus stand. Thereafter, P.W.5 Sunil and P.W.6 Mohamed proceeded to Socorro to the house of accused no. 6 Damaciano. While P.W.5 Sunil entered the house, P.W.6 Mohamed waited near the scooter outside the gate. P.W.6 Mohamed heard P.W.5 Sunil shouting and he also heard the sound of slaps. On hearing the noise P.W.6 Mohamed went inside the house where both the brothers accused no. 6 Damaciano and accused no. 3 Brazinho were assaulting P.W.5 Sunil with fist blows and slaps. P.W.6 Mohamed intervened and stopped them from assaulting P.W.5 Sunil. Both accused no. 3 Brazinho and accused no. 6 Damaciano threatened P.W.5 Sunil that he would be killed. Thereafter, they returned to the house of Sunil at about 7.30 p.m.. Thereafter they were sitting near the basketball court alongwith deceased Rajesh and P.W.7 Aspak. While sitting they noticed a motorcycle driven by accused no. 4 Manuel. Deceased Rajesh then said that he was going home and P.W.5 Sunil volunteered to reach Rajesh home. P.W.7 Aspak also volunteered to reach P.W.6 Mohamed to his house. P.W.5 Sunil and deceased Rajesh started first with P.W.7 Aspak and P.W.6 Mohamed following them. Accused no. 4 Manuel and another person stopped the scooter of P.W.5 Sunil. A Maruti van also came there and stopped in front of them and about 9 persons alighted from the Maruti van. Accused no. 4 Manuel

asked who was Sunil and after Sunil identified himself accused no. 4 Manuel removed a knife from his pant pocket and stabbed Sunil on his stomach. Accused no. 4 Manuel also gave a kick on Sunil and Sunil fell down. Deceased Rajesh intervened and at that time accused no. 4 Manuel also stabbed Rajesh on his stomach. Thereafter all the accused ran away. P.W.7 Aspak chased the Maruti van and noted the number and then took Sunil to the Dona Paula outpost. After the arrival of the police, P.W.5 Sunil and deceased Rajesh were taken to the Goa Medical College. In the cross-examination P.W.6 Mohamed has stated that he knew accused no. 3 Brazinho and accused no. 6 Damaciano as they were friends of P.W.5 Sunil and he knew them about 2 to 3 months prior to the incident and accused no. 6 Damaciano used to come to the house of P.W.5 Sunil and he knew them by their names prior to the incident. This witness has admitted that he was knowing accused no. 4 Manuel prior to the incident.

9. P.W.7 Aspak has stated that on 26th May 1998, at about 7.40 p.m., he returned home and was about to take his dinner. At that time the mother of P.W.5 Sunil came crying to his house and told him that she had received a telephone call from a boy named Damaciano stating that he would kill her son Sunil. She, therefore, asked P.W.7 Aspak to search for P.W.5 Sunil, who was not present at home at that time. He went in

search of Sunil and saw P.W.5 Sunil, P.W.6 Mohamed and deceased Rajesh at the basketball court and had informed Sunil that his mother was in search of him. He then saw a Yamaha motorcycle with two persons moving about and then decided to go home. He took P.W.6 Mohamed on his scooter and Sunil went on his scooter with Rajesh. As they were going the Yamaha motorcycle came there and the person driving the motorcycle asked him where Sunil had gone and he had indicated the direction in which Sunil had gone. When he reached the slope at Dona Paula, he saw a Yamaha motorcycle and a Maruti van and about 8 to 9 persons surrounding and then accused no. 4 Manuel stabbing Sunil and Rajesh. He has further stated that accused no. 8 Edwin had caught hold of the hands of Rajesh at the time when accused no. 4 Manuel was stabbing him. After the stabbing incident all the accused went away.

10. The learned trial Court in paragraph 18 of its Judgment has observed:- "However the evidence of Pw.5 and Pw.6 as to what transpired in the house of accused no. 6 is inconsistent and it is difficult to believe that Pw.5 and Pw.6 went at all to the house of accused no. 6." The learned trial Court has examined the inconsistencies in the evidence of both P.W.5 Sunil and P.W.6 Mohamed. The learned trial Court in paragraph 21 has recorded a finding that since P.W.5 saw accused nos.

1, 2, 5, 7, 8 and 9 for the first time, the identification of accused by P.W.5 ought to be corroborated by the test identification parade. The test identification parade was conducted by P.W.17 G.A. Parsekar, Executive Magistrate. P.W.25 Vinayak Alornekar was the panch. The learned trial Court has also held that the evidence on record indicates that the accused were shown to P.W.5, P.W.6 and P.W.7 at the police station and, thereafter, the identification parade was held. In view of the contradictions brought on record, the learned trial Court held that the statements recorded under Section 161 of the Code of Criminal Procedure of P.W.5, P.W.6 and P.W.7 indicate that the accused were shown to P.W.5, P.W.6 and P.W.7 before the identification parade was held. In his evidence P.W.5 Sunil has stated that he had been to the police station on many occasions before the identification parade was held and he had identified accused no. 7 on 4th August 1998 at the police station and on that day both P.W.6 and P.W.7 were with him. He had also identified accused no. 8 on 14th August 1998 at the police station. P.W.6 had identified accused nos. 1, 2 and 3 on 21st June 1998 and had identified accused nos. 4 and 5 on 25th June 1998 and accused no. 7 on 4th August 1998 and accused no. 8 on 14th April 1998. The learned trial Court, therefore, came to the conclusion that since P.W.5 Sunil, P.W.6 Mohamed and

P.W.7 Aspak had an occasion to see the accused while in police custody, the identification of these accused in the identification parade conducted by P.W.17 Parsekar was of no significance. The learned trial Court also held that since P.W.5 Sunil was knowing accused no. 4 by face, though not by name, the identification of accused no. 4 by Sunil can safely be accepted.

11. Thus, the evidence against the appellant/accused no. 4 Manuel is the testimony of P.W.5 Sunil and the recovery of knife Exhibit 1 at the instance of the accused. According to P.W.13 Ramesh Pednekar, a panch witness, the knife was recovered at the instance of accused no. 4 Manuel from his house, which was kept on top of a pillar in the verandah. According to the report of the Chemical Analyser, at Exhibit 69(A), human blood stains were found on Exhibit 1. The T-shirt Exhibit F worn by the deceased was sent for examination and the cut marks could have been caused by a sharp edged object, Exhibit 1. The hurt certificate of P.W.5 Sunil shows that he had received a stab injury in the abdomen and the injury was with 2 cms. of perforation on post-lateral aspect of ascending colon just below hepatic flexure and had undergone an operation. P.W.8 Dr. E.J. Rodrigues, who had conducted the postmortem examination of deceased Rajesh has stated that the injury on the left side of the

abdomen could be caused by the knife Exhibit 1. P.W.8 Dr. Rodrigues had opined that the death was due to haemorrhage and shock on account of stab injury on the abdomen.

12. The learned trial Court, therefore, accepted the evidence of the prosecution in respect of appellant/original accused no. 4 Manuel that he had stabbed deceased Rajesh and has also stabbed P.W.5 Sunil. Since he was known to P.W.5 Sunil, his identification could safely be acted upon. However, the learned trial Court came to the conclusion that appellant/original accused no. 4 Manuel had no intention to kill deceased Rajesh and, therefore, convicted him for an offence punishable under Section 304 Part II of the Indian Penal Code. The learned trial Court taking into consideration the injury received by P.W.5 Sunil convicted the appellant/original accused no. 4 Manuel for an offence punishable under Section 308 of the Indian Penal Code. The findings of the learned trial Court convicting the appellant/original accused no. 4 Manuel under Sections 304 Part II and 308 have not been challenged by the State in appeal. We have given our anxious consideration to the evidence and the submissions of the learned counsel for the appellant/original accused no. 4 Manuel and we find that the learned trial Court correctly appreciated the

evidence to come to the conclusion that it was accused no. 4 Manuel who had stabbed deceased Rajesh and P.W.5 Sunil. We, therefore, see no reason for interfering with the finding of conviction, which is recorded against the appellant/original accused no. 4 Manuel.

13. It is, however, submitted by the learned counsel for the appellant/original accused no. 4 Manuel, that the appellant has been in custody since his arrest, that is, on 21st June 1998 and has undergone 5 years of imprisonment out of the 6 years passed by the learned trial Court. Taking that into consideration, we are of the considered opinion that the ends of justice would be met, if sentence of 6 years of imprisonment is reduced to the period of imprisonment already undergone by the appellant. The appellant would, therefore, be entitled to be released forthwith, if not wanted in any other case.

14. Turning to the appeal against acquittal filed by the State, the learned trial Court has acquitted the respondent/original accused no. 8 Edwin as the identity of the accused at the scene of offence was doubtful. P.Ws.5, 6 and 7 had an opportunity of seeing the accused no. 8 Edwin while in police custody. Therefore, the identification of accused no. 8 Edwin during the identification parade was of no consequence. The

learned trial Court after appreciating the entire evidence has acquitted respondent/original accused no. 8 Edwin. This is an appeal against acquittal and, according to us, the view taken by the learned trial Court is a possible view, which can be taken on the basis of the evidence on record. No perversity is pointed out in the reasoning of the learned trial Court in acquitting the respondent/original accused no. 8 Edwin. Therefore, according to us, the finding of acquittal of respondent/original accused no. 8 Edwin does not warrant any interference. The said appeal, namely Criminal Appeal No. 58 of 2001, is, accordingly, dismissed.

15. Accordingly, Criminal Appeal No. 54 of 2001 is partly allowed. The conviction and sentence of the appellant/accused for the offences punishable under Sections 304 (II) and 308 of the Indian Penal Code, is maintained. The sentence of rigorous imprisonment for six years for an offence punishable under Section 304 (II) of the Indian Penal Code is, hereby, quashed and set aside and is substituted by a sentence of rigorous imprisonment for the period which had been already undergone by the appellant. The sentence for an offence under Section 308 of the Indian Penal Code is, hereby, maintained. Both the sentences shall run concurrently. The appellant/accused shall be released forthwith, if

not required in any other case. Criminal Appeal No. 58 of 2001 is dismissed.

(F.I. REBELLO)
JUDGE.

(P.V. HARDAS)
JUDGE.

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